Supreme Court, U.S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1971

No. 71-45

RONALD EARLE MARTIN,

Petitioner,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a Washington corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons Why Petition for Certiorari Should be Granted	4
1. An Important Federal Question should be settled by this Court	4
2. Petitioner should have been permitted to amend his Complaint to show the Facts of State Action	5
3. The Amended Complaint sufficiently alleged State Action	6
4. There was Religious Discrimination	7
5. The Test for "State Action" was Satisfied by the Relationships between the Respondent Public Utility and the State of Oregon	8
6. The "State Action" Doctrine needs further Clarification	10
7. The Court of Appeals erroneously applied existing case law	10
Conclusion	12
Appendix	13

TABLE OF AUTHORITIES

Page

Cases Cited

Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) 8, 9
Cohen v. *Norris*, 300 F.2d 24 (9th Cir. 1962) 6
Dewey v. *Reynolds Metals Company*, — U.S. —, 39 L.W. 3526 (June 1, 1971) 10
Evans v. *Abney*, 396 U.S. 435 (1970) 7
Evans v. *Newton*, 382 U.S. 296 (1966) 7
Kadlec v. *Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir. 1969) 10, 11
Marsh v. *Alabama*, 326 U.S. 501 (1946) 7
Marshall v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962) 5
Martin v. *Pacific Northwest Bell Telephone Company*, — F.2d — (9th Cir. 1971) 1
Monroe v. *Pape*, 365 U.S. 167 (1961) 6
Powe v. *Miles*, 407 F.2d 73 (2nd Cir. 1968) 11
Public Utilities Commission v. *Pollak*, 343 U.S. 451 (1952) 8, 9
Sherbert v. *Verner*, 374 U.S. 398 (1963) 7

Statutes

42 USC § 1983 ..... 2, 3, 6, 7, 8, 11, 12
ORS C. 756 9
ORS C. 757 9
ORS 757.005 9
ORS 757.020 9
ORS 757.045 9
ORS 757.105 9
ORS 757.140 - .150 9
ORS 757.205 - .245 9
ORS 757.605 - .685 9
ORS C. 758 9
ORS 758.010 9
ORS 772.205 - .200 10

Rules

F.R.C.P. 12 (b) (6) 3
F.R.C.P. 15 (a) 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 27, 1971.

OPINION BELOW

Ronald Earle Martin, Plaintiff-Appellant, v. Pacific Northwest Bell Telephone Company, a Washing-

ton Corporation, Defendant-Appellee, No. 26073, ____F.2d____ (9th Cir. 1971). There was no opinion in the United States District Court for the District of Oregon.

JURISDICTION

Judgment of the Court of Appeals for the Ninth Circuit, affirming the Judgment of the United States District Court for the District of Oregon, was entered on April 27, 1971. Jurisdiction rests in this Court by reason of Tit. 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Is the action of a State-regulated public utility in discharging an employee on account of his refusal to violate his religious beliefs and practices as a Seventh Day Adventist subject to an action for damages under the provisions of the Act of April 20, 1871, C. 22, § 1, 17 Stat. 13, Tit. 42 U.S.C. § 1983?

(2) Is Respondent's character as a State-created, protected and regulated public utility monopoly, so entwined with the interests of the State that its deprivation of Petitioner's First Amendment right to the free exercise of his religion was State action within the meaning of Tit. 42 U.S.C. § 1983?

STATUTE INVOLVED

Tit. 42 U.S.C. § 1983:

"Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent brought an action under Tit. 42 U.S.C. § 1983 for damages by reason of Respondent's having discharged him for refusing to work on Saturday contrary to the tenets of his faith as a Seventh Day Adventist (R. 1-3)[1]. A motion to dismiss the complaint under Rule 12 (b) (6) F.R.C.P. for failure to state an enforceable claim for relief was allowed (R. 4, 15). Petitioner moved under Rule 15 (a) F.R.C.P. for leave to file an amended complaint, which was denied (R. 16; 18-21; 40). A judgment of dismissal was entered (R. 41), from which an appeal was taken to the Court of Appeals for the Ninth Circuit (R. 43). The Court of Appeals affirmed the judgment of the trial court Per Curiam, holding that Respondent's dismissal of Petitioner was not "State action."

The amended complaint alleged facts summarized as follows:

On June 18, 1965, Petitioner had been employed

[1] Record citations are to the record in the proceedings in the Ninth Circuit.

by Respondent for seventeen and one-half years, and his training and experience qualified him only to do work of Respondent's type, in particular as an "office equipment maintenance man." Respondent did business in Tillamook County, Oregon, where Petitioner worked, as a regulated public utility subject to specific provisions of State law, and as such it enjoyed a State granted and protected monopoly in that area, in addition to other rights and privileges given only to public utilities by state law.

In January, 1965, Petitioner was baptized as a member of the Seventh Day Adventist Church, which forbids its members from gainful employment on Saturday. Petitioner notified Respondent that he would not work on Saturdays, and for several months Respondent acquiesced in that refusal. When Petitioner refused an order to work on Saturday on June 18, 1965, he was immediately and summarily discharged. He demanded, but never received, back wages, restoration of employment, proper dismissal documents or severance pay.

REASONS WHY PETITION FOR CERTIORARI SHOULD BE GRANTED

1. An imporant Federal question should be settled by this Court.

The Court of Appeals for the Ninth Circuit decided an important Federal question in a way which has not been, but should be, settled by this Court, to-wit: The Court of Appeals decided that even

though Respondent enjoys an economic monopoly which is protected and regulated by the State, its actions in depriving Respondent of his First Amendment right to the free exercise of religion was purely a matter of internal management, not related to Respondent's public service functions in which the State has an interest.

2. Petitioner should have been permitted to amend his complaint to show the facts of state action.

Despite the rule that a plaintiff in a § 1983 case should be given every opportunity to amend his complaint to plead the requisite facts to show a violation of the statute (*Marshall v. Sawyer*, 301 F.2d 639, 647 (9th Cir. 1962)), Petitioner was prohibited from filing an amended complaint which alleged the following facts relating to Respondent's relationship to the State of Oregon, which show that actions by Respondent constituted State action.:

(a) Respondent is a public utility under Oregon State law, and subject to the regulatory powers of the State's Public Utility Commissioner.

(b) Respondent enjoys the benefit of allocated service areas under Oregon law, which gives it a protected monopoly.

(c) Respondent enjoys guaranteed rates for services and protected rates of return on its investment.

(d) Respondent enjoys the exercise of governmental rights not available to private persons or

corporations other than public utilities under Oregon law, specifically including use of public property for its facilities and services and the privilege of exercising the State's power of eminent domain.

(e) Petitioner's training and experience qualified him only to work in operations such as those of the monopoly Respondent.

3. The amended complaint sufficiently alleged state action.

A claim under § 1983 must allege facts which show that the defendant (1) acting under color of any statute, ordinance, regulation, custom or usage of any State or Territory, (2) deprived plaintiff "of any rights, privileges or immunities secured by the Constitution and laws of the United States." Conduct is State action within the meaning of the statute if the actor was sufficiently clothed with the authority of the state. *Monroe v. Pape*, 365 U.S. 167 (1961); *Cohen v. Norris*, 300 F.2d 24, (9th Cir. 1962). The amended complaint sufficiently alleges that Respondent deprived Petitioner of his First Amendment right to the free exercise of his religion, and denied him Due Process of Law and Equal Protection of the Laws. The amended complaint also contained sufficient allegations of Respondent's character as a State-created, protected and regulated monopoly to form a foundation for a conclusion that Respondent's activities and interests are so entwined with the interests of the State that its action is "State action" within the ambit of § 1983.

4. There was religious discrimination.

A Seventh Day Adventist's religious beliefs and practices are protected under the First Amendment and under the Due Process and Equal Protection clauses of the Fourteenth Amendment against discriminatory actions. *Sherbert v. Verner*, 374 U.S. 398 (1963). A privately owned and operated business is not free to discriminate against the exercise of First Amendment and Fourteenth Amendment rights where the business' operations are essentially public functions, subject to state regulation, particularly where the state affords specific special protections and privileges to the business. *Marsh v. Alabama*, 326 U.S. 501 (1946). Where the state is so "entwined" in the operations of an otherwise private business or institution that the business or institution is essentially public in character, it remains subject to the restraints of the Fourteenth Amendment which § 1983 was passed to enforce. That public character must be determined by judging the relationship between the institution, its services rendered and the government. *Evans v. Newton*, 382 U.S. 296 (1966). Where that character exists, private property cannot be operated without being subject to the Fourteenth Amendment unless and until the owner gives up completely its relationship with the State and the consequent special privileges and protections that relationship affords. *Evans v. Abney*, 396 U.S. 435 (1970). What the State cannot do directly is prevented by § 1983 from being done indirectly by a company that enjoys a special relationship with the State.

5. The test for "state action" was satisfied by the relationships between the respondent public utility and the State of Oregon.

The controlling test for defining "State action" is whether there is a sufficiently close relationship between the State and the actor so that it can fairly be said that the latter's actions are sufficiently charged with public interest to be subject to the Fourteenth Amendment and the statute passed for its enforcement. Thus, the mere fact that a corporation is a public utility, or the fact that it thereby enjoys a government protected monopoly may not be themselves be enough to subject the actions of the corporation to § 1983; but when there is added to those facts the regulatory supervision of a State agency, the requisite relationship may be said to exist. *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952). Where there is a position of interdependence between the State and the allegedly private business, involving special State participation, protection and privileges, apparently private action is colorably action by or under the authority of the State. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). It is not necessary that the corporation charged with the unconstitutional discrimination actually be an instrumentality of the government; it is sufficient if the State and the corporation fit into a pattern of activities, obligations and responsibilities so that there is a position of interdependence. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-726 (1961).

Consistent with the standards established by *Burton, supra,* and *Pollak, supra,* Petitioner sought to file an amended complaint to set out with specificity the relationship between the State and the Respondent. The elements of that relationship are:

(a) Defendant is a public utility within the definition of ORS 757.005 and is therefore subject to the regulatory powers of the State of Oregon through the Public Utility Commission.

(b) The corporation is subject to the provisions of ORS Chapters 756, 757 and 758, which give the Public Utility Commissioner extensive and far reaching powers extending to every aspect of defendant's business;

(c) Under the Oregon system of allotted service areas (instead of the traditional franchise or public convenience and necessity systems) Respondent exercises a monopoly in the area where Petitioner was employed. See ORS 757.605 to ORS 757.685.

(d) As a specialized employee, Petitioner cannot exercise his training and experience for any other employer.

(e) The State of Oregon protects, regulates and effectively guarantees the Respondent in respect to its rates for services and its rates of return on investments and facilities: ORS 757.020, 757.045, 757.105, 757.140-.150, 757.205-.245.

(f) Respondent is entitled under ORS 758.010

to use public property for its operations and facilities, and is entitled to exercise the State's power of condemnation of private property for its facilities under ORS 772.205 - .220.

Taken all together, this list is pursuasive that the relationship between the State of Oregon and the Respondent is such that the two are as "entwined" as they could possibly be, short of the State's furnishing telephone service itself.

6. The "State action" doctrine needs further clarification.

It was anticipated that this Court's opinion in *Dewey* v. *Reynolds Metals Company*, — U.S. —, 39 L.W. 3526 (June 1, 1971), would be forthcoming before the decision of the Court of Appeals in this case, and that it would aid in the Court of Appeals' decision. The Court of Appeals did not wait for that decision, and the affirmance in *Dewey* by equally divided vote furnished no guidance. It is counsel's belief that the parameters of the State action doctrine were involved in the *Dewey* case, and they remain uncertain and indistinct. An opinion in this case by the Supreme Court of the United States would give a much needed definition to the doctrine.

7. The Court of Appeals erroneously applied existing case law.

The Court of Appeals rested its decision on two clearly distinguishable cases: *Kadlec* v. *Illinois Bell Tel Co.*, 407 F.2d 624 (7th Cir. 1969),

Cert. denied 396 U.S. 846, and *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968).

(a) *Kadlec* was an attempt by a telephone company customer to make a civil rights case out of a mere termination of service situation. Plaintiff had apparently violated the regulations limiting the use of a particular type of service offered by the telephone company. The termination was consistent with the filed regulations of the company. The Court there found that "the mere filing of these regulations" did not satisfy the requirements of § 1983 in the absence of a showing of "greater state involvement or control than is alleged in this case." Judge Kerner, in his special *concurrence* pointed out that, in fact, the case presented a pleading problem, and he listed a number of factors which, had they been alleged, might show a sufficient nexus or inter-dependence between the state and the company to make "some of its actions under color of law." The petitioner has gone much further than the plaintiff in *Kadlec* to show the intimacy of the utility and the State.

(b) *Powe* involved simply a state aided institution where there was not alleged and shown to be state control over the actual or potential activities of the institution itself. The Court, in that case, held that "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff, but with the activity that caused the injury." Petitioner has attempted to plead sufficient facts to show that the public utility has such a

relationship with the State that the State has the power, privilege and authority, whether exercised or not, to regulate and control, not only the utility's public service functions, but its "internal management."

Petitioner was discharged because he refused to violate his religious beliefs and practices. Respondent claims an immunity from § 1983 because it is a "private corporation." Respondent enjoys a complexity of rights, privileges and immunities accorded *only* by reason of its very special relationship to the state. It has not foresworn and would not foreswear those special relationships, but it would deny respondent his constitutional rights.

CONCLUSION

This Court should allow this Petition for Writ of Certiorari in order for there to be a determination whether respondent should be permitted to cloak its essentially public nature and consequent public activities under the guise of private ownership to the detriment of a long-time employee who seeks the protection of his Constitution and the statute enacted pursuant thereto.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD EARLE MARTIN, *Plaintiff-Appellant,*
v.
PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a Washington corporation, *Defendant-Appellee.* — No. 26,073

[April 27, 1971]

Appeal from the United States District Court for the District of Oregon

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Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

PER CURIAM:

The principal question on this appeal is whether the well pleaded allegations in plaintiff's proposed amended complaint show that defendant, in discharging plaintiff from its employment, was acting "under color of" state authority, within the meaning of 42 U.S.C. § 1983.[1]

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[1] "§ 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979."

Plaintiff, a long time employee of defendant Pacific Bell Telephone, was fired when he refused to work on Saturdays, following his baptism as a Seventh Day Adventist. A tenet of that Church forbids members to engage in gainful employment on Saturdays. Invoking the Civil Rights Act of 1871, plaintiff brought this action against Pacific Bell seeking reinstatement to his job, an accommodation of his work schedule with his religious obligations, and money damages. The gravamen of his complaint is that Pacific Bell, by discharging him, thereby prohibited him from the free exercise of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, thereby violated Section 1983.

Plaintiff alleged in his complaint that Pacific Bell is a Washington corporation authorized to do and doing business in Oregon as a public utility and exercising the privileges of a state protected monopoly.

Pacific Bell, responding by motion to dismiss under Rule 12(b)(6) F.R. Civ. P., urged in substance that these allegations did not show action taken "under color of any state law" and that therefore plaintiff had failed to state a federally enforceable claim. The District Court, apparently agreeing, granted the motion.

Plaintiff then tendered an amended complaint. This pleading was similar to the original, except for the detailed specification of the matters that plaintiff relied upon to show the requisite state action. Plain-

tiff's allegations in effect were that the State of Oregon granted Pacific Bell, as a public utility, the power of eminent domain and the right to construct and maintain without charges telephone lines along public thoroughfares; further that the State, through its Public Utilities Commissioner, regulated Pacific Bell's rates for service and prescribed the geographical area in which Pacific Bell could exercise its protected monopoly.

The district court, however, concluding that the proposed amendments would add nothing of substance to the asserted claims, denied filing of the amended complaint and entered judgment dismissing the action.

The First Amendment expressly restrains the Congress of the United States from enacting any law which abridges certain fundamental rights, including freedom of religion. The due process clause of the Fourteenth Amendment has been interpreted to impose the restrictions of the First Amendment upon the several states and their political subdivisions. *Fiske* v. *Kansas*, 274 U.S. 380 (1927); but is equally well settled that the prohibitions of the Fourteenth Amendment apply only to state action and not to "individual invasion of individual rights." Civil Rights Cases, 109 U.S. 3 (1883). It follows that the violation of such constitutional rights is actionable, under federal law, only when committed by one who is "clothed with the authority of the state and . . . purporting to act thereunder." *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962).

The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. *Kadlec* v. *Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir. 1969), Cert. denied 396 U.S. 846, for, as well stated in *Powe* v. *Miles*, 407 F.2d 73, 81 (2nd Cir. 1968), "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." In this case, plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management.

Plaintiff's discharge, of course, comes under the latter head.

Affirmed.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Opinion	1
Statement of the Case	1
Argument	
The record presents no federal question which will govern other cases, but merely a unique pleading matter of interest only to the parties. There is no conflict in the opinions of lower federal courts as to applicable legal standards	2
Conclusion	10

INDEX OF AUTHORITIES

Page

CASES CITED

Barnes v. Atlantic Transit System, 144 F. Supp. 156 (N.D. Ga.) 8

Browns v. Mitchell, 409 F.2d 593 (C.A. 10) 8

Craska v. New York Telephone Company, 239 F. Supp. 932 (N.D. N.Y.) 8

Curtis v. Peerless Insurance Company, 299 F. Supp. 429 (D.C. Minn.) 8

Elders v. Consolidated Freightways Corp. of Deleware, 289 F. Supp. 630 (D.C. Minn.) 8

Fullerton v. Monongahela Connecting Railroad Company, 242 F. Supp. 622 (W.D. Pa.) 8

Kadlec v. Illinois Bell Telephone Company, 407 F.2d 624 (C.A. 7), cert. den. 396 U.S. 846 5

Miner v. Commerce Oil Refining Corporation, 198 F. Supp. 887 (D. R.I.), rev'd. 303 F.2d 125 (C.A. 1) 7

Moteley v. Virginia Hardware and Manufacturing Co., 287 F. Supp. 790 (W.D. Va.) 8

Powe v. Miles, 407 F.2d 73 (C.A. 2) 2, 8

Rosee v. Board of Trade of City of Chicago, 311 F.2d 524 (C.A. 7), cert. den. 374 U.S. 806 7

United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 5

Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark.), aff'd. 183 F.2d 440 (C.A. 8) 7

Williams v. Yellow Cab Co. of Pittsburgh, Pa., 200 F.2d 302 (C.A. 3), cert. den. 346 U.S. 840 7

Winterthaler v. Three Rivers Motor Company, 312 F. Supp. 962 (W.D. Pa.) 8

STATUTE

42 U.S.C.A. § 1983 ..... 2, 4, 5, 10

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OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 441 F.2d 1116.

STATEMENT OF THE CASE

Petitioner's statement that the Court of Appeals for the Ninth Circuit affirmed the district court's

judgment of dismissal on the ground that respondent's discharge of petitioner was not "state action" is incomplete.

The Court of Appeals stated that in order to plead "state action," under such cases as *Powe* v. *Miles*, 407 F.2d 73, 81 (C.A. 2, 1968), the state must be shown to be involved, not simply with some activity of the defendant institution charged with inflicting injury, but with *the* activity that caused the injury. The court held that in this case ". . . plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management. Plaintiff's discharge, of course, comes under the latter head." (441 F.2d 1116, 1118).

ARGUMENT

The record presents no federal question which will govern other cases, but merely a unique pleading matter of interest only to the parties. There is no conflict in the opinions of lower federal courts as to applicable legal standards.

The opinion of the Court of Appeals was confined to reviewing the legal sufficiency of the particular allegations of the proposed amended complaint to ascertain whether the alleged wrongful discharge by respondent of one of its employees constituted "state action" under 42 U.S.C.A. § 1983.

With respect to a factual showing that respondent's employees responsible for petitioner's discharge

were acting under the authority or color of any state statute, ordinance, regulation, etc., and that state action was involved, petitioner's proposed amended complaint was limited to the following allegations:

"III

"Defendant is a Washington corporation authorized to do and doing business in the state of Oregon and in Tillamook County, a subdivision thereof, and is a public utility within the definition of ORS 757.005 and as such is subject to the regulatory powers of the state of Oregon acting by and through its Public Utility Commissioner under the provisions of ORS Chapters 756, 757 and 758; defendant has been allocated certain service areas by or with the acquiescence of the Public Utility Commissioner, particularly including Tillamook County, and exercises in such areas an economic monopoly protected by the state of Oregon; defendant is afforded by the state of Oregon protection and guarantees in respect to rates for services and rates of return on its investment and facilities; defendant is entitled and allowed by the state of Oregon to exercise certain governmental rights and privileges not available to non-public-utility businesses, including but not limited to use of public property for its facilities and services and the exercise of power to condemn private property for its own use; defendant provides facilities and services of a public nature as a matter of public convenience and necessity."

. . . . .

"IX

"Defendant, in committing the act of dis-

> charging plaintiff and the other acts heretofore set out, has deprived plaintiff of his First Amendment right to the free exercise of religion and has denied him Equal Protection of the Laws and Due Process, and defendant so acted under color of state law clothed with the authority of the state of Oregon as a public utility having the character, powers and privileges alleged and set forth in Paragraph III hereof, contrary to the provisions of the Act of April 20, 1871, C. 22, § 1, 17 Stat. 13." (R. pp. 18-19, 20).

A review of the above allegations reveals that petitioner's cause of action under 42 U.S.C.A. § 1983 for damages on account of alleged wrongful discharge from private employment rests upon the bald proposition that because a public utility performs its public service functions under the rules and regulations of a state agency (Public Utility Commissioner of Oregon), pursuant to various Oregon statutes regulating the activities of public utilities, the discharge of an employee by other company employees involves "state action" protected by the First and Fourteenth Amendments.

This contention is not only unsupported by authority, but is also contrary to reason and logic. On this record, it is clear that respondent is a private corporation operating in Oregon as a public utility. There is no claim that under any Oregon statute or regulation of the Public Utility Commissioner it is treated, legally or otherwise, as an agency of the state. Also, there is no claim that in discharging petitioner, re-

spondent's employees were acting as agents of the state, or were clothed with power by the state to take the wrongful action alleged.

To the contrary, the record is clear that the alleged action taken by respondent was done by individual employees of a private corporation, not acting pursuant to, or under the color or authority of, state law.

Since the Fourteenth Amendment and the implementing Civil Rights legislation are directed only against state action, it is axiomatic that 42 U.S.C.A. § 1983 does not afford protection against activities of individuals not acting pursuant to, or under the color or authority of, state law. In this case, petitioner's pleadings utterly failed to show what this Court has defined as action taken under color of state law in *United States* v. *Classic*, 313 U.S. 299, 326 (1941), as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law * * *."

The decision in *Kadlec* v. *Illinois Bell Telephone Company*, 407 F.2d 624 (C.A. 7, 1969), cert. den. 396 U.S. 846, relied upon by the court below, is closest in point. That case involved a customer who sued under 42 U.S.C.A. § 1983 for violation of constitutional rights arising out of alleged wrongful termination of service. The court of appeals affirmed the district court's dismissal of the second amended complaint for failure to state a cause of action. The court held (407 F.2d at pp. 626-627):

"It is well-settled that in order to establish a claim for damages under § 1983 of the Civil Rights Act the conduct complained of must have been engaged in under color of law and such conduct must have infringed upon the rights, privileges or immunities secured to the complaining party by the Constitution or laws of the United States. Haldane v. Chagnon, 9 Cir., 345 F.2d 601, 603 (1968); Duzynski v. Nosal, 7 Cir., 324 F.2d 924, 930 (1963); Jemzura v. Belden, N.D. N.Y., 281 F. Supp. 200, 205-206 (1968).

"At least one of the two elements essential to maintaining a claim under § 1983 is missing in the instant case. Under the facts of this case, we are of the opinion that defendant telephone company was not acting under the authority or pretense of any Illinois state statute, regulation, custom or usage in discontinuing plaintiffs' Call-Pak service. Thus, the second amended complaint, as amended, was properly dismissed by the district court for failure to state a cause of action under § 1983.

"Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, requested or cooperated in this suspension of service.

"The mere filing of these regulations with the state neither clothed Illinois Bell with state authority nor did it bring it under the aegis of the state. The § 1983 requirement of conduct taken under color of law '. . . can rarely be satisfied

in the case of anyone other than a state official.' Jobson v. Henne, 2 Cir., 355 F.2d 129, 133 (1966); Weyandt v. Mason's Stores, Inc., W.D. Pa., 279 F. Supp. 283, 288 (1968). Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983.

"We have carefully reviewed the cases cited by plaintiffs in support of their contention that defendant telephone company acted under color of law. These cases are readily distinguishable from the instant case and are not controlling. In all of the cases cited where conduct under color of law was found to be present, there existed greater state involvement or control than is alleged in this case."

Many other federal cases can be cited in support of this well-settled rule that a private corporation which operates its facilities pursuant to a franchise or license, in accordance with state law, cannot be classified as an agency of the state; and that the conduct of its agents or employees in managing its internal affairs does not constitute "state action" within the purview of 42 U.S.C.A. § 1983 (*Watkins* v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, 1016 (W.D. Ark. 1949), aff'd. 183 F.2d 440, 443 (C.A. 8); *Miner* v. *Commerce Oil Refining Corporation*, 198 F. Supp. 887, 891 (D.R.I. 1961), rev'd on other grounds 303 F.2d 125 (C.A. 1, 1962); *Williams* v. *Yellow Cab Co. of Pittsburgh, Pa.*, 200 F.2d 302, 307 (C.A. 3, 1961), cert. den. 346 U.S. 840; *Rosee* v. *Board of Trade of City of Chicago*, 311 F.2d 524 (C.A. 7, 1963), cert.

den. 374 U.S. 806; *Barnes* v. *Atlantic Transit System,* 144 F. Supp. 156, 158 (N. D. Ga. 1956); *Craska* v. *New York Telephone Company,* 239 F. Supp. 932, 935 (N.D. N.Y. 1965); see also: *Fullerton* v. *Monongahela Connecting Railroad Company,* 242 F. Supp. 622, 624 (W.D. Pa. 1965); *Motley* v. *Virginia Hardware and Manufacturing Co.,* 287 F. Supp. 790, 793 (W.D. Va. 1968); *Elders* v. *Consolidated Freightways Corp. of Delaware,* 289 F. Supp. 630, 633-635 (D.C. Minn. 1968); *Curtis* v. *Peerless Insurance Company,* 299 F. Supp. 429, 434 (D.C. Minn. 1969); *Winterthaler* v. *Three Rivers Motor Company,* 312 F. Supp. 962, 963 (W.D. Pa., 1970)).

Under the foregoing authorities, the court below was correct in following Judge Friendly's delineation in *Powe* v. *Miles,* 407 F.2d 73, 81 (C.A. 2, 1968), that "* * * the state action, not the private action, must be the subject of complaint."

This principle is well illustrated by the opinion of the Court of Appeals for the Tenth Circuit in *Browns* v. *Mitchell,* 409 F.2d 593 (C.A. 10, 1969), where the court affirmed the dismissal of a suspended private university student's suit for injunctive relief in the nature of reinstatement under the Civil Rights Act. The appellate court held that the disciplinary acts of the University of Denver did not constitute action under color of state law. The court also dismissed the claim that because areas of the university's property were dedicated to use by the public, this gave the university the color of a public institution and, therefore,

the action complained of was done under color of state law. In rejecting this concept, Chief Judge Murrah wrote (p. 596):

> "The students in our case suggest that the various conventional public services and functions performed by the University give it the color of a public institution and thus may be likened to the company town in Marsh, and the public way in Logan Plaza. From this they seem to rationalize that the disciplinary action complained of was done under color of state law, hence amenable to due process and a violation of civil rights. Superficially, this line of thought has some appeal but it is specious and wholly untenable. We may concede, without deciding, that judged by the totality of its public functions this University may be likened to Marsh and Logan Plaza for the purpose of exercising First and Fourteenth Amendment rights in its public ways. But that is as far as the rationale of these cases takes us.
>
> "Marsh and Logan Plaza were concerned only with the delineation of public places for purposes of First Amendment activities. They were not concerned with state action in the internal affairs of these enterprises. There is nothing in the logic of these cases to support the notion that the owner-employers in either case could not dismiss an employee without due process, or that such action could, in any sense of the word, be deemed state action. . . ."

By analogy to the case at bar, it is clear that even though respondent's properties are dedicated to service of the public, there is no support for the no-

tion that the telephone company ". . . could not dismiss an employee without due process, or that such action could, in any sense of the word, be deemed state action."

CONCLUSION

Petitioner's counsel has made no claim in this Court, nor in the Court of Appeals, that any further facts could be alleged in an additional amended pleading that would correct the obvious deficiency in petitioner's proposed amended complaint.

The Court of Appeals has found that the district judge acted in the exercise of a proper discretion in refusing to allow the filing of an amended complaint which also failed to plead an enforceable claim under 42 U.S.C.A. § 1983.

On the record before the Court, there is no substantial federal question, no legal issue of public importance, and no conflict between circuits.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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